IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.133 OF 1991.

Draupadi Ganpat Bhagat
residing at Pezari,
Ambapur,
Taluka Alibag,
District Raigad. .. Appellant
(Original Defendant)

vs.

Moreshwar Sakharam Bhagat
Residing at Shahapur,
Taluka Alibag,
District Raigad. .. Respondant.
(Original Plaintiff)

Mr. R.S.Apte, Advocate for the Appellant.

Mr. Anil L. Desai, Advocate for the Respondent.

CORAM ; S.R.SATHE, J.

DATED ; 12TH AUGUST, 2004.

JUDGMENT :

1. Being aggrieved by the judgment and order passed by the District Judge, Raigad in Civil Appeal No.51 of 1987 whereby the order passed by the Court of Joint C.J.J.D. Alibag, decreeing the plaintiff’s suit for permanent injunction was

confirmed and appeal was dismissed, the original defendant has filed this second appeal. (for the sake of convenience, hereafter the parties shall be referred to as plaintiff and defendant).

2. The brief facts giving rise to this second appeal are as under :

. The suit property was initially owned by the plaintiff. Present defendant is the wife of plaintiff’s brother Ganpat. According to plaintiff, defendants son Vidyadhar had made an encroachment in thesuit property and had constructed a shade. Regular Civil Suit No.77 of 1962 was therefore filed against him for possession. The said suit was decreed in favour of the plaintiff and on the basis of the said decree plaintiff filed Regular Darkhast No.5 of 1973 for possession of the encroached portion. In April 1973 defendant’s son Vidyadhar requested for time to vacate the suit property and then in October 1973 he handed over the possession of the said property to plaintiff. Thereafter the plaintiff was all along in possession of the suit

property. However, in May 1984 when plaintiff had gone to Mumbai, taking advantage of the said situation, the defendant tried to make encroachment in the suit property. The plaintiff, therefore obstructed her and then filed the present suit on 1.1.1985 and claimed permanent injunction against the defendant restraining her from making the encroachment and carring out construction in the suit property.

. The defendant filed Written Statement, Exhibit 17 and opposed the suit claim. She contended that the allegation of the plaintiff that her son had handed over the possession in October, 1973 is not true and correct. On the contrary, she contended that the suit property is in her possession continously for last 25 years and the taxes of the said house are also being paid by the defendant and she has become owner by adverse possession. She, therefore, prayed for dismissal of the suit.

. On these pleadings, the learned trial Judge framed issues and after considering evidence

adduced by both the parties came to the conclusion that the plaintiff is the owner of the suit land and the same is in his possesion. The Court also observed that the defendant tried to obstruct the plaintiffs possession and therefore decreed the plaintiff's suit for permanent injunction. Being aggrieved by the same, the defendant filed First Appeal in the District Court, Alibag. However, the said appeal also came to be dismissed. Being aggrieved the defendant filed the present appeal.

3. At the time of admission this Court has framed following substantial question of law.

> a) Whether the decree obtained by the Plaintiff in Regular Civil Suit No. 77/62 was time barred?
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> b) Whether the respondent can be said to have obtained possession in exwecution of the decree in Civil Suit No.77/62 in the absence of satisfaction of the decree, being recorded by the executing Court?
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> c) Whether the Respondents' Darkhast application filed in the year 1984 which was dismissed as barred by limitation would show that the Respondent did not obtain possession, as claimed by him and whether the Lower Appellate Court erred in not considering the import of the dismissal of the said execution proceedings?

4. Shri R.S.Apte, learned Advocate for the defendant canvassed before me that in the instant case both the courts below have totally ignored the evidence on record and given the perverse finding that the plaintiff had proved her possession on the date of the suit. According to him the plaintiff had filed regular Darkhast No. 34 of 1984 on 20.4.1984 wherein posesion of the said property was claimed. However, the said Darkhast was dismissed as time barred on 29.6.1984. The courts below failed to give due importance to this Darkhast and wrongly held that she had received the possession of the suit property in October 1973. He, therefore, submitted that it is necessary to set aside the findings recorded by both the courts below as the same are not at all warranted from the material on record and the earlier Courts Order.

5. As against this, the learned advocate for the respondent submitted that both the courts below have given finding of fact that on the date of the suit plaintiff was in possession and as

such no substantial question of law is involved in the matter and the second appeal is not maintainable. It is true that the scope of section appeal as per section 100 of the C.P.C. is very limited. However, at the same time, there are various authoritive pronouncements wherein it has been held that if the finding recorded by the court below is perverse or not at all warranted from the material on record and given by totally ignoring the documentary evidence on record, then the High Court can interfere in such case.

6. It is needless to say that in order to suceed in this suit it was necessary for the plaintiff to adduce cogent and convincing evidence to show that on the date of the suit, he was in possesion of the said property. It is an admitted fact that in respect of this very property, earlier suit was filed against the defendant's son and decree for possession was passed against him. Not only that, on the basis of the said decree, execution proceeding i.e. Darkhast No.5 of 1973 was filed and the Court was called upon to issue possesion warrant against the Defendant. It is

the plaintiff's case that in that Darkhast proceeding the son of present defendant had requested for six months time and accordingly the same was granted and then in October 1973 he handed over the possesion. Firstly, it must be noted that if really the possession would have been handed over to plaintiff at that time then normally plaintiff would have reported the said matter to the Court. Admittely, there is absolutely nothing on record to indicate that plaintiff had accordingly informed the Court about the fact that he had received the possession. An attempt was made to show that the learned Advocate for the plaintiff had written one letter to plaintiff wherein he had made reference about the promise given by the defendant to vacate the premises. However, the said letter is also not today on record. Moreover, from the perusal of the judgment of both the courts below it is very clear that even in that letter it was nowhere specifically mentioned that the defendant had handed over the suit prperty to plaintiff. It seems that the lower court has relied upon the oral testimony of the plaintiff and witness Maruti

Mahadeo, brother in law of the present plaintiff. From the evidence it is very clear that he could not give any details to show as to when and how the possession was delivered by the defendants son to plaintiff. So, there was in fact not sufficient material to show that the plaintiff had actually received the possession in October 1973 as alleged by him.

7. The most important circumstance which negatives the plaintiffs theory is that the plaintiff had filed Regular Darkhast No. 34 of 1984 for execution of the decree passed in her favour in 1963. The said Darkhast was filed on 20.4.1984 in which the plaintiff had claimed the possession. If really the plaintiff had received the possession from Defendants son in October 1973, there was absolutely no reason for her to file second darkhast for possession. The filing of second darkhast for possession on 20.4.1984 gives death blow to the plaintiffs version that the defendant had handed over possession in October 1973. It is the case of plaintiff that the alleged encroachment was made in May, 1984.

But it appears from the evidence on record that the plaintiff had not at all received possession till filing of the second darkhast and it is not the case of the plaintiff that he received possession after the filing of the said darkhast. It clearly shows that the case of the plaintiff that he had actually received the possession in October 1973 and the defendant obstructed the posession in May 1984 is not correct. So, looking to the case from any angle it is very clear that the lower Courts ought to have given due importance to the fact that there was no evidence to show that possession was handed over to plaintiff at the time of the execution of the earlier darkhast No.5 of 1973 andthat is why second darkhast was filed in April 1984, but the same also came to be dismissed. The finding is given without taking into consideration the evidence on record and ignoring the earlier order in execution proceedings and as such is perverse. So I think that this is a fit case to interfere with the first appellate court’s order. In this view of the matter, the appeal is allowed. The order passed by both the courts below is set aside

and the plaintiffs suit for permanent injunction is dismissed.

(S.R.Sathe, J.)

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